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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF THE PYRAMID LAKE PAIUTE TRIBE OF INDIANS AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

Both the United States and the State of California have consented in writing to the filing of this Brief. Their letters have been filed with the Clerk's Office.

The primary goals of the Pyramid Lake Paiute Tribe of Indians of Nevada are to restore and then preserve its once world renowned fisheries in the Truckee River and Pyramid Lake. The most important element in the restoration effort is securing the necessary waters and water rights. *United States* v.

Nevada, 412 U.S. 534 (1973); *Pyramid Lake Paiute Tribe of Indians* v. *Morton,* 354 F.Supp. 252 (D.D.C. 1973).

The Tribe's interest in this case arises out of the Washoe Project, a federally authorized, partially complete reclamation project, 70 Stat. 775, 43 U.S.C. § 614 et seq. Section 4 of that Act, 43 U.S.C. § 614c, mandates the restoration of the Pyramid Lake fishery.

As part of the authorized Washoe Project, Stampede Reservoir on the Little Truckee River in California was completed in 1970. Since 1973, the Secretary has operated Stampede in accordance with Operating Criteria and Procedures designed to maximize the benefits to the Pyramid Lake fishery. *See Pyramid Lake Paiute Tribe of Indians* v. *Morton, supra;* 38 F.R. 6697 (1973).

In 1976 the State of Nevada, joined by two water distributing entities, brought suit against the Secretary of the Interior challenging his operation of Stampede Reservoir. *Carson-Truckee Water Conservancy District* v. *Andrus,* Civil No. R-76-152 BRT in the United States District Court for the District of Nevada at Reno.[1] The plaintiffs in that case seek a court order requiring the Secretary to enter into a contract to supply Nevada interests with water for irrigation, domestic, municipal and industrial and other purposes. They claim, *inter alia,* that domestic uses are entitled to a preference under California law and that utilizing the waters stored in Stampede Reservoir for restoration of the Pyramid Lake fishery constitutes waste

[1] The Tribe is lodging three copies of the Amended Complaint with the Clerk and is serving copies on the United States and the State of California.

under Nevada law. The Pyramid Lake Tribe has intervened as a defendant.

The outcome of this case could have an important bearing on *Carson-Truckee Water Conservancy District* v. *Andrus, supra.* For that reason the Tribe has filed this Brief Amicus Curiae.

ARGUMENT

I. The Plain, Literal, Unambiguous Meaning of Section 8 Excludes the Conditions Imposed by Decision 1422

The primary argument urged by California and the supporting *amici* states is based on "the simple, plain meaning" of Section 8.[2] They contend that the Secretary of the Interior must proceed in conformity with all state laws relating to control, appropriation, use or distribution of water. That is not what the statute says.

Section 8 of the Reclamation Act, 32 Stat. 388, 390 (1902), 43 U.S.C. § 372, does not incorporate all state water laws. It is limited to those laws "relating to the control, appropriation, use, or distribution of water *used in irrigation.*" Emphasis added. The Secretary is required to "proceed in conformity with" those laws, no others.[3]

The 25 conditions imposed by Decision 1422 have nothing to do with irrigation. They relate to prefer-

[2] California's Brief, p. 12.

[3] *See* Sax, "Federal Reclamation Law" in 2 Clark, Waters and Water Rights pp. 150-151 n.65 (1967). Even as to conditions relating to irrigation, state jurisdiction appears to be foreclosed and preempted by the Act of August 13, 1914, 38 Stat. 688, 43 U.S.C. § 440, which authorizes the Secretary of the Interior "to make general rules and regulations governing the use of water in the irrigation of the lands within any project . . ."

ences for so-called counties of origin (Nos. 4 and 25), downstream water quality (No. 5), protection of fish and wildlife (No. 2), access by state officials (Nos. 15 and 16), studies of water related matters (Nos. 3, 7, 8, 12 and 21) and whitewater river rafting (Nos. 1 and 2). These non-irrigation related conditions are outside the scope of the state laws referred to in Section 8.

California seeks to circumvent this fatal flaw and avoid the plain, literal, unambiguous language of Section 8 through a one sentence footnote that states:

> Although § 8 pertains only to water for "irrigation," it is made applicable to other purposes of multi-purpose projects by the usual congressional directive that the project is to be operated "pursuant to the Federal reclamation laws," a directive found in the act authorizing the New Melones Project. 76 Stat. 1191 (1962).[4]

The contention obviously fails. It is true that most, if not all, multi-purpose projects undertaken since 1939[5] include a proviso that brings the new project under the Reclamation Act of 1902 as amended. *See, e.g.*, the Washoe Project Act, 43 U.S.C. § 614a(a), and the legislation authorizing New Melones, 76 Stat. 1173, 1191 (1962). The effect is to incorporate Section 8 and the other provisions of the Reclamation laws. But absent some amendment to or modification of Section 8 itself, these provisions cannot change its coverage, meaning, or scope which remains limited to state "laws . . . relating to . . . water used in irrigation." In other words, the fact that projects may be authorized for purposes other than irrigation does not and can-

[4] California's Brief, p. 18 n.13.

[5] *See* text at pp. , *infra*.

not incorporate state substantive water laws relating to subjects other than irrigation. *Hancock* v. *Train*, 426 U.S. 167 (1976).

First Iowa Hydro-Electro Co-op. v. *Federal Power Commission*, 328 U.S. 152 (1946), presented an analogous question relating to the meaning and scope of Section 27 of the Federal Power Act, 41 Stat. 1063, 1076 (1920), 16 U.S.C. § 821, which is similar to, but broader than, Section 8. Section 27 provides:

> That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.[6]

First Iowa held that an Iowa law designed to protect fish life which prohibited interbasin transfers of water was not saved or incorporated by Section 27 because the Iowa law fell outside the scope of its coverage. 328 U.S. at 165-166 and 175-176. The Court reasoned (328 U.S. at 175-176):

> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase "any vested right acquired therein" further emphasizes the application of the section to

[6] This statute, passed in 1920, demonstrates that Congress was keenly aware of the distinction between state water laws relating to irrigation and other types of uses and that when Congress intended to save or incorporate state laws relating to municipal and other uses, it said so.

> property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words "other uses." Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.

The holding of *First Iowa* limiting the coverage of Section 27 of the Federal Power Act to specific property rights defined by state law is controlling here because Section 27 refers to "water used in irrigation or for municipal or other uses" whereas Section 8 is limited solely to irrigation. This Court has noted the close connection between Section 27 of the Federal Power Act as construed in *First Iowa* and a provision of the Boulder Canyon Project Act that is virtually identical to Section 8. *Arizona* v. *California,* 373 U.S. 546, 588 n.93 (1963).[7]

II. Federal Legislation Leaves No Room Or Need for State Controls

The Reclamation laws, now supplemented by later legislation that applies to all of the federal government's water resource undertakings, comprise a pervasive and comprehensive package that leaves no room for imposition of mandatory state controls and/or con-

[7] Subsequent decisions interpreting and applying Section 27 of the Federal Power Act have emphasized its similarity to Section 8 of the Reclamation Act and have relied on this Court's interpretation of Section 8 in City of Fresno v. California, 372 U.S. 627 (1963), and Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958). *See* Scenic Hudson Preservation Conference v. Federal Power Commission, 453 F.2d 463, 478 (2d Cir. 1971), *cert. denied,* 407 U.S. 926; State of California v. Federal Power Commission, 345 F.2d 917, 923 (9th Cir. 1965); and Portland General Electric Co. v. Federal Power Commission, 328 F.2d 165, 176-177 (9th Cir. 1964).

ditions. Existing law as well as long prevailing reclamation practices insure that the states' voices have been and will continue to be heard in planning, constructing and operating reclamation projects. It is neither necessary nor desirable to subject federal projects and installations to the jurisdiction of the western states.

A. Federal Developments Often Located on Interstate Streams and Subject to the Regulations and Operational Control of the Secretary of the Interior Are Not Subject to the Jurisdiction of State Administrative Agencies.

There are three aspects of the federal reclamation program that should be noted at the outset. First, reclamation projects are direct federal undertakings that involve large expenditures of federal funds and the construction of massive federally owned and operated facilities. The reclamation program is not a regulatory or even a licensing scheme. *Contrast Burbank* v. *Lookheed Air Terminal,* 411 U.S. 624 (1973); and *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955). Traditionally federal installations and facilities are "free from regulation by any state." *Hancock* v. *Train,* 426 U.S. 167, 178 (1976); *Environmental Protection Agency* v. *State Water Resources Control Board,* 426 U.S. 200 (1976); *Arizona* v. *California,* 283 U.S. 423 (1931).

Second, the reclamation program often involves developments on interstate streams where waters are stored in one state and utilized in another. The Washoe Project, 70 Stat. 775 (1956), 43 U.S.C. §§ 614-614d, on the Truckee and Carson Rivers in California and Nevada is an example. Interstate developments were con-

templated from the inception of the Reclamation program. Section 8 itself provides that nothing in the act "shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof."[8] And one reason that President Roosevelt advocated enactment of a national reclamation act was that "far-reaching interstate problems are involved; and the resources of single states would often be inadequate."[9] *See also* the statements of Congressmen Mondell and Newlands quoted in the District Court's opinion, 403 F.Supp. 874 at 885 and 887, reproduced in the Appendix to the Brief for the United States in Opposition to the Petition for Certiorari at pp. 21a-22a and 26a-27a.

If Section 8 is held to authorize state control of reclamation projects through the imposition of conditions on permits authorizing the appropriation of water, one immediate question that will arise on interstate projects is, "whose conditions?" In the case of the Stampede Division of the Washoe Project, whose conditions would take precedence, California's, where the water is impounded, or Nevada's, where most of it is used? The probability of conflict is apparent.[10] In

[8] This part of Section 8 is discussed in Wyoming v. Colorado, 259 U.S. 419, 463 (1922). Its legislative history is reviewed in the Appendix to California's Brief.

[9] 35 Cong. Rec. 6775 (1901), quoted in California's Brief at p. 23.

[10] For example, California might require as a conservation measure that communities contracting for water from Stampede Reservoir for municipal purposes have a metering system. But there is a Nevada law that prohibits the installation of water meters in Reno and Sparks. Nevada Rev. Stat. § 704.230 as amended in 1977.

Arizona v. *California,* 373 U.S. 546, 589-590 (1963), the Court cited the possibility that projects would be subjected to the "varying, possibly inconsistent, commands of the different state legislatures" as one reason why the Boulder Canyon Project Act did not make state laws applicable to developments on the Colorado River. It is impossible to apply Section 8 one way when projects are within a single state but to give it a more restricted meaning when interstate projects and streams are involved.

Third, in interpreting the meaning of Section 8, the Court must look not only to the language and legislative history of that provision, but to the Reclamation Act as a whole. *Chemeheuvi Tribe of Indians* v. *Federal Power Commission,* 420 U.S. 395, 403 (1975). In particular, Section 10 of the 1902 Reclamation Act, 32 Stat. 388 at 390, 43 U.S.C. § 373, delegates broad and comprehensive authority to the Secretary of the Interior to carry out the reclamation program.

> The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

Further, under the Reclamation Act as originally enacted, reclamation projects were actually operated by

Another actual example is provided by the amended complaint in Carson-Truckee Water Conservancy District v. Andrus, *supra,* where the plaintiffs, who are interested only in the use and distribution of water in Nevada, invoked the provisions of California Law that afford a preference for domestic over irrigation uses. *See* the Amended Complaint lodged with the Clerk of this Court at pp. 9-11. While that particular claim is foreclosed by City of Fresno v. California, 372 U.S. 627 (1963), it is illustrative of the kinds of problems that arise on interstate projects and streams.

the Reclamation Service. Section 6 specifically provided that "the title to and management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the government until otherwise provided by Congress."[11] Section 2 authorizes and directs the Secretary to make examinations and surveys and to locate and construct irrigation works for the storage, diversion and development of waters. Section 7 authorizes the Secretary to acquire any necessary rights or property by purchase or condemnation.

This Court has given effect to the Reclamation laws as well as similar delegations of authority by granting broad latitude and discretion to administrative officials in implementing the legislative program. *Arizona* v. *California,* 373 U.S. 546, 575-590 (1963); *Dugan* v. *Rank,* 372 U.S. 609 (1963); *Berman* v. *Parker,* 348 U.S. 26, 35 (1954); *United States ex rel. TVA* v. *Welch,* 327 U.S. 546, 551-552 (1946). *See also United States ex rel. TVA* v. *Two Tracts of Land,* 532 F.2d 1083 (6th Cir. 1976); *United States* v. *2,606.84 Acres of Land in Tarrant Co., Tex.,* 432 F.2d 1286 (5th Cir. 1970), *cert. denied,* 402 U.S. 916, *rehearing denied,* 403 U.S. 912; *Turner* v. *Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966).[12]

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[11] As we shall see *infra,* the Act was subsequently amended to authorize the Secretary to enter into operation and maintenance contracts with an association of the water users on each project.

[12] Owing to the pendency of critically important litigation in the Court of Appeals for the Ninth Circuit to which it is a party, *Amicus Curiae* Pyramid Lake Paiute Tribe of Indians wishes to make clear that the Secretary's powers under the Reclamation Act do not authorize him to extinguish Indian property rights in the absence of an explicit statutory directive. *See* Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Santa Fe Pacific Railway Co., 314 U.S. 339 (1941); United States v. Winnebago Tribe of Indians, 542 F.2d 1002 (8th Cir. 1976). Henkel v. United States, 237 U.S. 43 (1915), stands for the proposition that the Secretary has "broad" and "comprehensive" authority under the Reclamation Act, and may acquire the land of an individual Indian when (a) it is consistent with the relevant Indian laws, and (b) he "deals fairly with the Indians." 237 U.S. at 50. *See* Morton v. Ruiz, 415 U.S. 199, 236 (1974); and Delaware Tribal Business Committee v. Weeks, —— U.S. ——, 51 L.Ed.2d 173, 183 (1977).

The question that is posed by this litigation is whether the actual operation of reclamation projects is within the Secretary's authority under Sections 10, 7, 6 and 2 of the Act or is subject to the provisions of state law under Section 8.

In this same connection it should also be noted that the kinds of conditions imposed by the State Water Resources Control Board in Decision 1422 are of relatively recent origin.[13] Traditionally, state administrative agencies have simply determined whether there are any surplus waters. If so, appropriate permits were issued.[14] Consequently, insofar as Congress can be said

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[13] California points out that though its permit system was not initiated until 1914, Wyoming and three other states had adopted such programs by 1902. The issue here relates not so much to the existence of a permit system as to whether Congress has conferred jurisdiction on state agencies to impose operating conditions and limitations on federal projects.

[14] The leading water authority at the turn of the century states that the power of state engineers under the early appropriation statutes, then referred to as "the new legislation," is "ministrial." 1 Weil, Water Rights in the Western States §§ 408 and 409 [3rd Ed. 1911]. With regard to the provisions of the statutes granting authority to state engineers to reject applications which are con-

to have contemplated operating restrictions of the kind imposed by Decision 1422, they are much more

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trary to public policy, Weil quotes a 1906 Bulletin published by the U.S. Department of Agriculture:

> Wyoming, the pioneer State in providing for the public supervision of the acquirement of rights, gives the engineer authority to reject applications which are contrary to public policy. This has been followed by most of the States which have adopted codes in recent years. This provision is so general in its terms that it may be interpreted to mean much or little. In Wyoming the exercise of this authority has given him a great deal of trouble. The engineer of Nevada holds that this provision gives him no authority to reject applications which conform to the general rules of the office. The Utah engineer held that this provision gave him authority to choose between possible uses and refused an application for a use which in his opinion was not for the best possible use of the water. Appeal was taken to the courts, the engineer was overruled in this matter, and at the next session of the legislature the law was repealed. In the other States which have adopted this provision the law is not effective. It appears, therefore, that this law is either ineffective or unpopular with both the engineers and the public . . . .

1 Weil, *supra* § 416. There is no mention of either any power of state engineers to impose detailed conditions on water permits or any instance where any such power was exercised.

See also Hutchins, Water Rights Laws in the Nineteen Western States 176 (1971), where is it said: "Administrative procedure governing the acquisition, determination, and administration of water rights, in contrast with its early stages, has become highly developed throughout the West." The same authority also notes: (1) that Art. XVI, § 6 of the Colorado constitution provides that "The right to divert the unappropriated waters of any natural stream shall never be denied;" (2) that under Idaho law an appropriator may follow either the "constitutional" procedure of diverting water and applying it to a beneficial use or the formal statutory procedure; and (3) that in Montana "there is no control over the appropriation of water centered by statute in the State administrative organization." 1 Hutchins *supra* at 177-178. Thus it appears that even today the conditioning procedures utilized by California's Water Resource Control Board are not available to the water agencies in some of the other western states.

likely to have been included within the delegation of operational and regulatory authority to the Secretary rather than Section 8's grant of jurisdiction to the states.

B. The Reclamation Scheme Provides for Unitary Management Under the Control of the Secretary of the Interior.

The outcome of this case is controlled by the holding of *Arizona* v. *California*, 373 U.S. 46, 575-590 (1963), that the Secretary's powers under the Boulder Canyon Project Act, particularly the authority to enter into water supply and cost reimbursement contracts, preempt the field so that "state law has no place." 373 U.S. at 588. The general reclamation laws taken together with the acts authorizing particular projects, like the Boulder Canyon Project Act, "can function efficiently only under unitary management" where the Secretary has "sufficient power . . . to direct, manage and coordinate" the operation of reclamation facilities. 373 U.S. at 589 and 590.

As we have seen, the original 1902 Reclamation Act delegated broad and comprehensive powers to the Secretary of the Interior. Since then Congress itself has exerted increasing control.[15]

Under the 1902 Act, the Secretary had authority to initiate projects as long as there was money in the reclamation fund established by Section 1 of the Act.[16] The only requirement was that he determine that a

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[15] This discussion relies heavily on Sax, "Federal Reclamation Law" in 2 Clark, Waters and Water Rights ch. 8 (1967).

[16] Sax, *supra* note 15 at pp. 121-122 and 136.

proposed project was "practicable," i.e. that it was able to repay its costs.[17] In 1910, Congress provided that no irrigation projects could be initiated unless they were approved by direct order of the President.[18] The so-called Fact Finders Act of 1924 required that the Secretary's report to the President include information regarding water supply, engineering features, cost of construction, land prices and probable cost of development.[19] The Secretary must make a written finding that the project "is feasible,[20] that it is adaptable for actual settlement and farm houses, and that it will probably return the cost thereof to the United States." 43 U.S.C. § 412.

The current project initiation procedures have their roots in Section 9(a) of the Reclamation Project Act of 1939, 53 Stat. 1193. Professor Sax' summary of those procedures is succinct and accurate and is here reproduced with some of the footnotes omitted.[21]

> Section 9(a) . . . provides that "no expenditures for the construction of any new project . . . shall be made . . . by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on" engineering feasibility, the estimated cost of proposed construction and the part of the cost which can properly be allocated to irrigation, power, municipal and miscellaneous

[17] Section 45 of the 1902 Act.

[18] Act of June 25, 1910, 36 Stat. 836, 43 U.S.C. § 413.

[19] Act of December 5, 1924, 43 Stat. 702, 43 U.S.C. § 412.

[20] Findings of both, "agricultural and engineering feasibility" were required. 43 Stat. 685.

[21] *Supra*, note 15, pp. 139-141.

purposes and probably be repaid to the United States. It then continues:

> If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations . . . together with any allocation to [non-reimbursable purposes] equal the total estimated cost . . . then the new project . . . shall be deemed authorized and may be undertaken by the Secretary.

In practical operation, this provision is implemented by certain preliminary steps to be taken before any project can get under way. The first is a reconnaissance investigation, which is a preliminary field report initiated by the Bureau of Reclamation. "The chief purpose of the reconnaissance report is to indicate whether further detailed investigations are justified." If the reconnaissance report shows that a possible development plan may be feasible, and if there has been specific authorization by Congress,[22] the Bureau may proceed with its major investigation leading toward the preparation of a so-called feasibility report.

The basic document upon which authorization of a project rests is the regional director's report. This report contains a comprehensive analysis of the project area, water supply, construction plans, agricultural economy and needs, repayment capability of farmers, economic justification based on

[22] Federal Water Project Recreation Act of July 9, 1965, P.L. 89-72, § 8, 79 Stat. 217, 16 U.S.C. 460*l*-19. The real reason for imposing a specific authorization requirement, it is reported, was to prevent the Bureau of Reclamation from undertaking a study of the feasibility of importing water from the Pacific northwest into the Lower Colorado River Basin. Clark, Condemnation of Water Rights for Preferred Uses—A Replacement of Prior Appropriation?, 3 Willamette L.J. 215,229 (1966).

a benefit-cost analysis, allocation of costs among functions in a multi-purpose project, analysis of reimbursement ability among the uses, a conclusion, and a recommendation as to authorization."[33] The principal features of the report are the findings of engineering and financial feasibility (ability of the project to repay its reimbursable costs), both of which the statute expressly requires, and of economic feasibility (benefit-cost analysis). A finding of economic feasibility is not expressly required by the reclamation laws; it is a requirement which has been derived from the Flood Control Act. . . .

If the regional director's report is favorable, it is forwarded to the Secretary. The Secretary is required, under the Flood Control Act, to give to affected states and to the Secretary of the Army information developed by his investigations and an opportunity to co-operate therein; moreover, he is required to transmit to them a copy of his proposed report for their written views and recommendations, which he must then submit to Congress along with his report. If the submissions of the affected states or the Secretary of the Army set forth objections to the proposal, it may not be authorized except by an Act of Congress, which is, in practice, required anyway.

In addition, the Secretary is required to consider water quality control as well as to consult with wildlife officials in each state in which there is to be construction "with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as by providing for the development and improvement

[33] When the Secretary recommends a project to Congress, his report and the report of the regional director, which the Secretary has also forwarded, are customarily printed together as a House Document.

thereof." In this connection any state agency's reports must be made "an integral part" of any report by the Secretary, and the Secretary must "give full consideration to" any such report in his project plans.

Subject to the foregoing limitations, upon a finding of feasibility, and upon submission to the President and Congress of his report and findings, a project is automatically "deemed authorized and may be undertaken by the Secretary."[34] In fact, the automatic authorization procedure is not currently used; congressional authorization of each project is obtained.

The statutory submission to the President is accomplished by sending the report to the Bureau of the Budget for "advice concerning the relationship of the project to [the President's] program before transmitting the report to the Congress." At this point the Secretary sends his report to Congress, recommending that authorization be made by statute. The authorization acts frequent-

[34] Act of August 4, 1939, ch. 418, § 9(a), 53 Stat. 1193, 43 U.S.C. 485h (a). Even if the Secretary utilized the automatic authorization device, he could not, as a practical matter, undertake to go ahead with the project on his own, since a 1914 statute prohibits the Secretary from expending reclamation fund money except as authorized by annual congressional appropriations. Act of August 13, 1914, ch. 247, § 16, 38 Stat. 690, 43 U.S.C. 414. It has not been thought that this restriction is affected by the "may be undertaken" language of the Reclamation Project Act of August 4, 1939, ch. 418, § 9 (a), 53 Stat. 1193, 43 U.S.C. 485h (a). But see Reclamation Project Act of August 4, 1939, ch. 418, § 9 (b), 53 Stat. 1194, 53 U.S.C. 485h (b).

A project found not feasible may still lawfully be undertaken by the Secretary after special provision for it has been made by Act of Congress, following a submission of the Secretary's report and findings to the President and the Congress. Reclamation Project Act of August 4, 1939, ch. 418, § 9 (a), 53 Stat. 1193, 43 U.S.C. 485h (a).

ly include a substantial number of special rules and conditions which become the law of the project for that particular enterprise."

[32] A number of such authorization acts are printed in 43 U.S.C. beginning at § 614. See also Bureau of Reclamation, Dept. of Interior, *Project Feasibilities and Authorizations* (Govt. Print. Office 1957).

It is particularly important to note that the congressionally mandated procedures provide ample opportunity for the affected states and state agencies to submit their comments, criticisms, suggestions, plans and recommendations to Congress. *See particularly* the Flood Control Act of 1944, 58 Stat. 887, 33 U.S.C. § 701-1, the Fish and Wildlife Coordination Act of 1958, 72 Stat. 564, 16 U.S.C. § 662,[33] and the Water Project Recreation Act of 1965, 79 Stat. 213, 16 U.S.C. §§ 460*l*-12 to 460*l*-21. These procedures would be totally superfluous if the states were authorized to impose unilateral conditions on their permits. They evidence Congress' intention that there is to be close coordination and cooperation with the states in the development of water resource projects and that the Congress is to resolve conflicts between federal and state plans. They refute the totally unsupported allegations of California and the *amici* states that affirmance of the lower courts' decisions would leave the states with no voice in water development and allocation matters.[34] And they provide a comprehensive federal program for taking into consideration every conceivable aspect of water resources planning including flood control, fish,

[33] *See* Udall v. Federal Power Commission, 387 U.S. 428 (1967).

[34] To those familiar with the politics of water allocation in the West, the states' complaints and fears are almost laughable. *See* Hundley, Water and the West (1975).

wildlife, recreation and allocation matters. As stated by Sax, "As a political fact, then, the law presses the Secretary to be responsive to state desires."[35]

Professor Sax goes on to describe in more detail the content of the various feasibility and engineering reports that are submitted to Congess.[36] He also outlines the procedures and requirements set forth in the Water Project Recreation Act of 1965, *supra*,[32] the Fish and Wildlife Coordination Act, *supra*,[37] the Water Supply Act of 1958, 72 Stat. 319, 43 U.S.C. § 390b,[38] and the water Resources Planning Act of 1965,

[35] Sax, *supra*, note 15 at p. 283.

[36] Sax *supra* note 15, pp. 141-147.

[37] *Id.* at pp. 147-157. Sax states (at pp. 147-148):

> The Water Project Recreation Act of 1965, although complex and intricate in detail, is built upon a quite simple premise: Facilities for recreation and fish and wildlife enhancement should be an integral part of federal water projects, but the construction of such facilities should be made dependent upon acceptance by local public agencies of responsibility for administration and for partial cost sharing.

[38] *Id.* at pp. 151-153. Concerning the Fish and Wildlife Coordination Act, Sax states (at p. 151):

> It provides that whenever waters are to be impounded, diverted, or otherwise controlled by a federal agency or permittee there must be consultation with the affected state officials, that their views must be made an integral part of any report submitted to the Congress, along with a benefit-cost analysis, that such reports shall be fully considered, and that project plans "shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum over-all project benefits."

[39] *Id.* at pp. 290-291. Sax summarizes the essentials of that Act as follows (at p. 290):

> The Water Supply Act provides that in planning Army and Reclamation dams there may be taken into account present and future needs for municipal and industrial water. Up to 30% of the total estimated cost of any project may be allocated to

79 Stat. 244, 42 U.S.C. §§ 1962 et seq."

Superimposed on all of this is the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 et seq., particularly 42 U.S.C. §§ 4331-4334." NEPA " requires all agencies of the United States "to the fullest extent possible" to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an environmental impact statement that analyzes the consequences of, and alternatives to, the proposed action. The impact statement must also consider "any adverse environmental effects which cannot be avoided should the proposal be implemented." Most importantly for our purposes, NEPA mandates cooperative federal, state and local efforts.

> Prior to making any detailed statement, the responsible Federal official shall consult with and

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anticipated future demands if state or local interests give reasonable assurances that there will be a need for the facilities and that they will be paid for not more than fifty years after they are first used.

[80] *Id.* at pp. 283-284. Sax has this to say about the 1965 legislation (at p. 283):

> The most ambitious effort yet undertaken to foster co-operation between state and federal agencies, as well as among the various federal departments, was the enactment of the Water Resources Planning Act of 1965. It not only promotes the *idea* of working together; it provides operative means for the development of the joint and co-ordinated plans of local, regional, and national planning authorities.

[80] NEPA had not been enacted when Sax' chapter on Federal Reclamation Law was written in 1967.

[81] 42 U.S.C. § 4332(2)(3).

> obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . .

Thus as applied to proposed undertakings under the reclamation program, NEPA's force is felt on at least two levels. First, since proposed reclamation projects must seek both congressional authorization and the appropriation of funds for its construction, the NEPA statement serves the function of making the Congress aware of the proposal, its environmental consequences, alternatives and possible mitigation measures as well as the views of all interested and affected federal, state and local agencies. Congress can then if it chooses legislate the resolution of inter-governmental conflicts. Second, the NEPA statement tells the responsible federal officials of the available alternatives and the views of other federal agencies and affected states, local governments and concerned citizens and groups. The federal decision maker will then be in a position to exercise informed judgment within the limits of his statutory powers.

The decisions of the lower court must be affirmed in order to effectuate NEPA. If critical water allocation decisions become the province of state administrative agencies, the NEPA process cannot function in the manner intended by Congress. Instead of federal of-

ficials being presented with the views and comments of appropriate state and local agencies to be considered in federal decision making, the federal government will be told how the project will be operated. The ambit of federal discretionary action will be drastically narrowed if not altogether eliminated. That result is well illustrated by this very controversy, *Environmental Defense Fund* v. *Armstrong,* 487 F.2d 814 (9th Cir. 1973), *cert. denied,* 416 U.S. 974, and is contrary to NEPA's express mandate:

> Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter.

42 U.S.C. § 4332."

Finally, one other recent and important federal statute bears on the fundamental jurisdictional conflict raised by this case, the Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. Section 1536 provides:

> The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authori-

[33] In this particular controversy both sides can claim to be on the side of the environment. Environmental Defense Fund v. Armstrong, *supra,* 487 F.2d at 820. Less "clean" hydroelectric power probably means more nuclear or fossil fuel burning plants. Other states may not be as sympathetic to fish, wildlife and recreation concerns as California. *See* p. 2, *supra* and note 33, *infra.* Our concern has to do with the integrity and viability of the NEPA procedures. We do not purport to assess the environmental pedigree of the western states vis-a-vis the federal government which, in any event, changes from time to time.

> ties in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.

Again, the states' role is advisory. Primary authority is vested in the Secretary of the Interior and other federal officials. Subjecting federal water resource projects to the conditioning authority of state administrative agencies is inconsistent with this recent federal statutory scheme.

All of this legislation, including the basic Reclamation Act as amended, is predicated on federal-state cooperative efforts. But "if there is to be a joint, comprehensive, and co-ordinated program, legal mastery of it must come to rest somewhere." [34] Under the Constitution the only logical and permitted place is the federal government.[35] As we have seen, in some of its legislation Congress has established itself as the forum for resolving conflicts.[36] That itself is incompatible with

[33] Nevada's attitude toward endangered species is exemplified by the actions of its officials described in Cappaert v. United States, 426 U.S. 128 (1976).

[34] Sax, *supra* note 15 at p. 284. *See* Arizona v. California, 373 U.S. at 589 and 590 quoted *supra* at p. 7.

[35] Hancock v. Train, 426 U.S. 167, 178-179 (1976); Arizona v. California, 283 U.S. 423 (1931).

[36] *See* pp. 14-20, *supra.*

the conferral of mandatory conditioning authority on state administrative agencies. Any remaining doubt, here as in *Arizona* v. *California,* 373 U.S. 546, 575-590 (1963), is laid to rest by the Secretary's delegated power to negotiate and execute water supply and repayment contracts.

California and the *amici* states seek to distinguish *Arizona* v. *California* on the grounds that it involved a contest between a specific federal law and conflicting state laws and that under such circumstances the federal law is obviously supreme.[37] But the provision of the Boulder Canyon Project Act on which the decision rested, Section 5, 43 U.S.C. § 617d, simply authorizes the Secretary to contract for the storage and delivery of stored water and for reimbursement of operation, maintenance and construction costs. It also prohibits anyone from using any of the stored water without a contract except as otherwise provided in the Act.[38] The general reclamation laws applicable to New Melones as well as all other projects confer the same contractual authority on the Secretary.

As we have noted, under the 1902 Reclamation Act all projects were to be operated by the federal government. Section 6. Pursuant to Section 4 of that Act the Secretary of the Interior arranged with each water user for repayment of construction on an individual basis. In 1914, the Secretary was authorized, "in his discretion" and "under such rules and regulations as he may prescribe" to designate water users' organiza-

[37] California's Brief at pp. 52-53 n.40; *Amici* Brief of Arizona et al., pp. 14-15.

[38] The exception relates to "present perfected rights" which are accorded preference under Section 6 of the Act, 43 U.S.C. § 617e.

tions as fiscal agents to collect repayment money. The Secretary was also authorized to transfer to such organizations responsibility for care, operation and maintenance of all or any part of the project works, "subject to such rules and regulations as he may prescribe." 38 Stat. 687-688, 43 U.S.C. §§ 477 and 499. By 1922, the Secretary was enabled to contract directly with the users' organization, which could bear the repayment obligation in place of the individual users. 42 Stat. 541, 43 U.S.C. § 511. In 1924, Congress required certain projects "to take over, through a legally organized water users' association or irrigation district, the care, operation and maintenance of all or any part of the project works, subject to such rules and regulations as the Secretary may prescribe, and thereafter the United States, in its relation to said project, shall deal with a water users association or irrigation district." 43 Stat. 702, 43 U.S.C. § 500. Then in 1926 water supply and repayment contracts were made mandatory. Section 46 of the Act of May 25, 1926, 44 Stat. 649, 43 U.S.C. § 423e provides:

> No water shall be delivered upon the completion of any new project or new division of a project initiated after May 25, 1926, until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States.

The 1939 amendments to the Reclamation Act include similar provisions. 53 Stat. 1193, 43 U.S.C. §§ 485h(d)

and 485h(e)." All of the foregoing laws apply to the New Melones Project. 76 Stat. 1191.

Consequently, what we have here is a precise analogue to the Boulder Canyon Project Act construed in *Arizona* v. *California*, 373 U.S. 546 (1963), where the Supreme Court placed principal reliance on the Secretary's contracting authority in holding that state water laws could not be applied. The Court stated:

> The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it.

373 U.S. at 580.[40] Here, as in *Arizona* v. *California*, "where the Secretary's contracts carry out a congressional plan for the complete distribution of waters to users, state law has no place." 373 U.S. at 588. "Unitary management," 373 U.S. at 589, is required.

The conditions imposed by Decision 1422 drastically interfere with the Secretary's contractual authority. Most significantly, they severely limit the amount of hydroelectric power than can be generated at New Melones. *See Environmental Defense Fund* v. *Armstrong, supra*, 487 F.2d at 820-821.[41] That in turn ad-

[39] *See also* 43 U.S.C. § 485e which again expressly delegates broad discretionary authority to the Secretary to negotiate the terms and conditions of the repayment and water supply contracts.

[40] The Court noted that Congress had imposed some limits, that the Secretary is responsible to the President and Congress and that his actions are subject to judicial review. 373 U.S. at 584-585.

[41] For example, Decision 1422 would prohibit the Secretary from entering into a contract with a water users' association that requires maximum utilization of the project's power generating capability.

versely affects the project's ability to repay the cost of construction, a matter of intense if not overriding concern to the United States." It is difficult even to conceive of any important condition on a water permit that would not detract from the Secretary's broad discretionary powers to negotiate the terms and conditions of water supply and reimbursement contracts.

III. The Distribution of Federal-State Authority Proposed By the Western States Is Unworkable

California and her supporting *amici* states recognize, as they must, that the three decisions of this Court interpreting and applying Section 8 and its counterpart in the Boulder Canyon Project Act[42] establish, at a minimum, that federal laws and policies preempt state law when there is a direct conflict between the two. They argue however that the states should be allowed to apply their laws "where Congress has not spoken" or where "the project's purposes are not otherwise impaired."[43] This system will not work unless the Secretary of the Interior has the ultimate authority to accept or reject the state's proposals. As

[42] *See* Sax, *supra* note 15 at pp. 257-258 and 273-274.

[43] Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); City of Fresno v. California, 372 U.S. 627 (1963); and Arizona v. California, 373 U.S. 546 (1963). The district court's opinion, 403 F.Supp. at 892, Appendix to the Brief for the United States In Opposition to Certiorari at p. 41a, does not give sufficient weight to the City of Fresno v. California decision. That case stands for more than that Section 8 defines the property interests, if any, for which compensation must be paid. It also holds that notwithstanding Section 8 the provision of the reclamation laws according a preference to irrigation over domestic uses overrides a California statute granting priority to domestic uses.

[44] California's Brief, p. 59; Brief of Arizona et al., p. 17.

previously stated, legal mastery must rest somewhere. The alternative is confusion, chaos and endless litigation.

Under the system proposed by the states, all competing user groups, which will often cross state lines, will petition and lobby the states' political and administrative officials for favorable conditions in their permits. If the Secretary favors or adopts an operating plan or other regulations that do not permit compliance with the state's conditions, litigation will ensue. The issue will be whether the state's conditions are consistent with federal laws and policies.

As we have seen in Part II of this Brief, when Congress authorizes and appropriates funds for a reclamation project, it is presented with volumes of materials relating to every conceivable aspect of the project, cost data, engineering feasibility, water supply, crop data, repayment capability and prospects, economic impacts, affects on fish, wildlife, endangered species and their habitat, air pollution and water quality, population growth, recreation, etc. Some of the reports are published as House or Senate Documents.[45] Sometimes, as in the case of New Melones, the authorizing legislation expressly refers to the document that contains some of the reports.[46] Some of the documents, like environ-

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[45] *See* p. 16, *supra*.

[46] As an example the New Melones legislation states:

> The new Melones project, Stanislaus River, California, authorized by the Flood Control Act approved December 22, 1944 (58 Stat. 887), is hereby modified substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 453, Eighty-seventh Congress, at an estimated cost of $113,717,000. . . ."

76 Stat. 1191.

mental impact statements, may include administrative decisions regarding how the project will be operated; others may simply list the alternatives and their likely impacts with or without recommendations or rankings. In these circumstances, deciphering what is or is not included in the law or policy of the project is virtually impossible." It is, at the very least, a monumental undertaking.

The states' proposal invites conflict. When a water user does not like something that the Secretary has done, he will petition the state administrative agency to impose a condition that is more to his liking. For example, the Secretary has adopted regulations applicable to the Newlands Project in Nevada that are designed to reduce its Truckee River diversions and thereby increase the inflow to Pyramid Lake. 43 C.F.R. § 418; 38 F.R. 6697 (1973). Those regulations prohibit what one court has described as the "highly wasteful" practice of diverting water for single purpose hydroelectric generation during the winter months.[48] They also require the water users' association to adopt other measures for conserving precious water supplies such

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[47] This case provides an apt illustration with the United States maintaining that California's conditions are inconsistent with the project and California contending that there is no incompatibility at all. The district court expressly refused to rule on that aspect of the controversy. 403 F.Supp. at 901, Appendix to the Brief for the United States In Opposition to Certiorari at p. 63a. Given Congress' traditional and legally mandated concern about the repayment capability of reclamation projects, it seems difficult to conclude that a condition that substantially reduces power revenues is consistent with Congress' overall plan. See the text accompanying footnotes 41 and 42, *supra*.

[48] Burley Irrigation District v. Ickes, 116 F.2d 529, 535 (D.C. Cir. 1941), *cert. denied*, 312 U.S. 687.

as installation of measuring devices, charging for water by the acre foot instead of by the acreage irrigated, etc."[49] Adopting the position of the states in this litigation would invite state administrative agencies to attempt to modify or effectively repeal these Secretarial regulations.[50] Whether they survive would then depend upon the outcome of lengthy and complex federal litigation in which the court attempts to fathom the mysterious, indeed in this case non-existent, intent of Congress.[51]

The decisions of this Court have consistently recognized that federal water resource undertakings cannot be made subject to state laws or state vetoes or mandatory state conditions. *Arizona* v. *California*, 373 U.S. 546 (1963); *City of Fresno* v. *California*, 372 U.S. 627 (1963); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958); *Federal Power Commission* v. *Oregon*, 349 U.S. 435 (1955); *First Iowa Hydroelectric Corp.* v. *Federal Power Commission*, 328 U.S. 152 (1946); and *Arizona* v. *California*, 283 U.S. 423 (1931). *Cf. Hancock* v. *Train*, 426 U.S. 167 (1976); and *Environmental Protection Agency* v. *California*, 426 U.S.

[49] *See* Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.C.Cir. 1973).

[50] The State of Nevada might determine that single purpose hydro generation is more important and a higher beneficial use than protecting the habitat of rare, threatened or endangered species.

[51] The Newlands Project was one of the very first authorized by the Secretary of the Interior in 1902. There was no congressional attention specifically focused on this project. *See* p. *supra*.

200 (1976)."[52] Congress has just as consistently legislated an important advisory role for state and local agencies in planning and complementing federal water policies and projects. That legislation presupposes federal supremacy. The system has worked well. Certainly no one has accused the Bureau of Reclamation of being insensitive to state and local concerns. No change is warranted, particularly one which would interpose the federal courts as the ultimate arbiters.

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[52] State and local agencies always have the option of proposing to federal officials that certain conditions or regulations be adopted. *See* Pacific Power & Light Co. v. Federal Power Commission, 333 F.2d 689 (9th Cir. 1964). If the federal officials do not agree, states have the ability to go to Congress during authorization or appropriation hearings.